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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

Respectfully submitted,

AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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SUMMARY

To maximize the workings of the marketplace, the Commission should adopt tariffing rules that permit nondominant carriers, to the greatest extent possible under the Communications Act, to do business as though they were not regulated. The Commission's proposals to allow nondominant carriers to file tariffs on one day's notice, to state rates in ranges, and to have flexibility as to form and content are consistent with this goal insofar as they permit nondominant carriers to do new business in a way that reflects speedy, largely unconstrained responses to competitive circumstances.

In one respect, however, the Commission must strengthen its procedures. Companies in unregulated industries cannot change the terms of their long-term contracts with their customers by simply filing a paper with an agency; and the stability of contracts is fundamental to the workings of the market. Accordingly, streamlined regulation should extend only to those tariff filings which the carrier certifies do not affect existing long-term arrangements, except where the customer consents to the change. Filings which, on the other hand, do affect such long-term arrangements without customer consent are unfair and are in no sense pro-competitive. These filings should be subject to a 45-day notice period and automatic suspension. To justify such filings, the carrier should be required to show, under the "substantial cause" test, that

circumstances exist which, under general contract law, would excuse the carrier's nonperformance.

The Commission should also take this opportunity to clarify the applicability to nondominant carriers of the settled legal principle that a single entity can offer both common carriage and private services. Existing Commission rules effectively permit nondominant carriers to divert some portion of their capacity to private carriage. The Commission should state affirmatively that such carriers may offer private carriage, thereby providing the marketplace with an additional mechanism for spurring competition.

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The Ad Hoc Telecommunications Users Committee (Ad Hoc Committee) hereby submits its comments in response to the Notice of Proposed Rulemaking (NPRM) released by the Commission on February 19, 1993, in the above-captioned proceeding.

I. INTRODUCTION

This proceeding is merely the latest stage in a tortured sequence of events, at the end of which long-standing Commission policies of unquestionable public benefit have been suddenly overturned. Until recently, events had proceeded more smoothly. Over the past several years, the pace of increasing interexchange competition had steadily quickened, while the Commission's regulatory responses to that competition, if somewhat less steady, had over time enabled it to blossom. The gravitational center of the Commission's regulatory strategy had been its forbearance policy, adopted as to resellers in the Second Report and Order in the Competitive Common Carrier rulemaking and extended in the Fourth Report and Order to

other nondominant interexchange carriers (IXCs).[1/] It was the forbearance policy which enabled the market to work by allowing those carriers who lacked sufficient market power to justify tariffing oversight to react quickly to marketplace developments, to offer innovative service arrangements and to compete vigorously on price and service without the fear of being disciplined by a powerful competitor.

So, over time, the nondominant carriers made sufficient inroads for the Commission to begin loosening the ties that had historically bound AT&T. The approval of Tariff 12, the streamlining of the tariff regulation of most AT&T business services in CC Docket No. 90-132, the introduction of contract-based tariffs -- all were timely and important measures further heightening interexchange competition. The regulatory and marketplace landscapes

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1/ Policy and Rules for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979); First Report and Order, 85 F.C.C.2d 1 (1980); Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 (1981); Second Report and Order, 91 F.C.C.2d 59 (1982), recon. denied, 93 F.C.C.2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28292 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 F.C.C.2d 554 (1983), vacated sub nom. American Telephone & Telegraph Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992); Fourth Further Notice of Proposed Rulemaking, 96 F.C.C.2d 922 (1984); Fifth Report and Order, 98 F.C.C.2d 1191 (1984); Sixth Report and Order, 99 F.C.C.2d 1020 (1985), reversed sub nom. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

provided a win-win situation for consumers, carriers and regulators.

Unfortunately, the interexchange carriers did not see it that way. Their jockeying for regulatory advantage before this Commission and the courts has brought the industry to a point at which, instead, we face a lose-lose situation. This is a direct consequence of the Court of Appeals' having vacated the Fourth Report and Order, and this in turn resulted from a complaint AT&T brought against MCI for having done business under the forbearance policy -- a complaint brought years after the policy was adopted. American Telephone & Telegraph Co. v. FCC, 978 F.2d 727 (D.C.Cir. 1992). AT&T's victory at the Court of Appeals was made possible, in large part, by the nondominant carriers' previous appellate victory when the Sixth Report and Order was reversed. Id., 978 F.2d at 735. Moreover, AT&T claims to have been motivated, at least in part, by the nondominant carriers' having opposed lessened regulation for AT&T, including such victories for the nondominant carriers as the prohibition on AT&T's bundling of 800 Service in new Tariff 12 options.

Both sides continue their litigious ways. As they inflict legal and regulatory losses on each other, the real losers are consumers. Disruption and confusion are pervasive in the marketplace as each new legal development throws the rules of the game further into doubt. Too much

of the vendors' energy -- and strategy -- is devoted to regulatory gaming rather than competing. And, ultimately, the regulatory tug-of-war has gotten us to the point where the keystone of the competitive interexchange -- forbearance -- is, for now at least, gone.[2/]

In these circumstances, the relief proposed in the NPRM herein is a regrettable necessity. The appropriate course of action for the Commission is to establish

business, there is a danger that nondominant carriers can use the tariff mechanism unfairly, by unilaterally changing the terms of long-term arrangements with customers. The Commission must take steps to assure that this does not happen. As the Commission concluded in Competitive Common Carrier, a marketplace works most efficiently if sellers and buyers are permitted freely to contract for mutually acceptable price, terms and conditions. But contracts can perform this efficiency-enhancing function only if they are (with very narrow exceptions provided for in traditional contract law) fully binding on both parties. The Commission has measures available to it within its tariffing process to assure that this key market mechanism is not eviscerated, and that carriers are just as bound as customers to honor the terms of their long-term agreements.

Finally, the Ad Hoc Committee submits that it is time for the Commission to address seriously an issue which has been discussed, but not acted upon, in a number of recent proceedings. Specifically, the Commission should expressly recognize the fact that its current procedures and existing law permit nondominant carriers to offer some of their services on a private carrier basis, if with respect to those offerings they negotiate on an individual basis and do not hold themselves out as serving the public.

II. THE MEASURES PROPOSED IN THE NPRM FOR MAXIMUM STREAMLINING SHOULD BE ADOPTED, BUT ONLY FOR FILINGS THAT DO NOT ABROGATE OR CHANGE CARRIERS' LONG-TERM COMMITMENTS

The Commission has proposed the following procedures to streamline regulation of nondominant carriers' tariff filings to the maximum extent:

(1) The required notice period would be reduced from fourteen days to one day;

(2) Nondominant carriers would be permitted to state either a maximum rate or a range of rates in lieu of a single fixed rate; and

(3) Nondominant carriers' tariffs would only be required to contain the bare minimum of information required under Section 203 of the Communications Act. They would have near-total flexibility as to the form of their tariff transmittals.[3/]

NPRM at paras. 14-26. The Commission would continue in place its current policies that nondominant carriers need not include cost support with their tariff filings, and its rule that nondominant carrier tariff filings will be rejected or suspended only on an extraordinary showing. 47

3/ Nondominant carriers would be required to file updated tariffs (as opposed to revised pages only) on 3½-inch floppy disk, with a brief explanatory cover letter and indications within the tariff of what has been added or changed. NPRM at para. 25. The Ad Hoc Committee takes no position on the details of this part of the proposal. It appears to be designed to reduce the Commission's storage needs for the tariffs of the numerous nondominant carriers, while permitting ease of retrieval for the Commission and the public. Because tariffs will govern to some extent the relationships between vendors and their customers, however, the Commission should require that every carrier must immediately provide to any customer who requests it a hard copy of its then-effective tariff and any then-pending revisions.

C.F.R. § 1.773(a)(ii). For the most part, the Ad Hoc Committee agrees that these proposals are sound. They appear designed to allow nondominant carriers to do business

is because the economic benefits of contracts depend on their ability to enable the parties to order their relationships in predictable ways, and this is achieved only by making them binding on both parties, except in the most extraordinary circumstances. See generally, e.g., R. Posner, Economic Analysis of Law (3d Ed. 1986) at 79 et seq., and authorities cited therein.

To avoid this result, the Commission must refine its procedures to assure that streamlining does not apply to carrier attempts to make unilateral changes to the terms of long-term arrangements. Accordingly, to qualify its filings for streamlined treatment under the Commission's proposed procedures, the carrier should be required to certify to the Commission that its filing does not make any changes to any existing long-term arrangement, or that all customers whose arrangements are affected consent to the changes. Filings for which the carrier is unable to make such certification should be handled according to the procedures set forth in section III, below.[4/]

4/ Of course, a false certification should be penalized severely under the Commission's power to punish regulated entities for making false statements to it. In addition, the Commission should expressly state that the making of such false certifications is an unreasonable practice under Section 201(b) of the Communications Act, and that accordingly customers injured by such a false certification, in that their long-term arrangement have been unilaterally altered without the protections set forth below, have the right under Sections 206 and 207 of the Act to recover from the carrier any damages they may incur. See 47 U.S.C. §§ 201(b), 206, 207.

As long as it applies only to filings which do not affect long-term arrangements, a shortened notice period increases the ability of the carriers to respond swiftly to competitive circumstances, and minimizes the regulatory lag on the market, by enabling carriers to place into effect with the minimum delay competitive responses to the market at large or to individual customers' situations. Thus, for filings which affect only short-term arrangements or only new (rather than existing) long-term arrangements, the Ad Hoc Committee favors the reduction of the notice period for nondominant carriers' filings to one day.

Subject to the same caveat, the Ad Hoc Committee also endorses the Commission's proposals as to the content and form of the tariff filings. Contracts in the unregulated world are usually private affairs, and often contain competitively sensitive information. There is no reason to require more than the statutory minimum information in nondominant carriers' filings, and the Commission should not do so. Likewise, there is no need to impose specific form requirements and limit the flexibility of the carriers in this regard. And the Ad Hoc Committee has heretofore made known its support for allowing nondominant carriers the option of filing rate bands or maxima in lieu of single stated rates. See Ad Hoc Committee Comments, CC Docket No. 92-13, at 20.

III. CARRIERS SEEKING TO CHANGE LONG-TERM CONTRACTS SHOULD BE PERMITTED TO DO SO ONLY IN CIRCUMSTANCES

circumstances, not a separate test. See Showtime Networks, Inc. v. FCC, 932 F.2d 1, 6 (D.C. Cir. 1991).

Although the Committee is not persuaded that application of a "substantial cause" test is the only avenue available to the Commission for protecting customers' reliance interests, the Commission need not alter the fundamental structure of that test, so long as it clarifies its approach both procedurally and substantively. Procedurally, the Commission should do two things. The first procedural step should be to require carriers to identify in their tariff filings any impact the filings would have on existing contracts and, in the event such impact exists, to state in detail the ground on which the carrier believes substantial cause exists for the change. Carriers should also make such filings -- which are by definition not pro-competitive -- on 45 days' notice, and such filings should be excepted from the general presumption of lawfulness accorded other nondominant carrier tariff filings.

If the purported substantial cause showing is omitted or is insufficient on its face, of course, rejection is called for; but even if a justification is proffered which might arguably support the filing, suspension and investigation of the tariff filing should be effectively automatic. Only in this way can it be reasonably determined

the substantial cause test has been met. And only by giving such filings close scrutiny can the customer's interests -- and by extension the efficacy of contracts as a market mechanism -- be fully protected.

The second procedural step should be to make explicit that the "substantial cause" test is to be used not only in disposing of petitions to reject, suspend or investigate tariff filings which unilaterally modify contracts or long-term arrangements entered into under tariffs, but also in complaint proceedings alleging that such filings are unjust and unreasonable. Inasmuch as the test is a specific application of the justness and reasonableness standard to particular circumstances, it patently applies in both contexts, but the Commission has never expressly stated as much.[5/] As noted above, moreover, where a tariff filing which changes long-term arrangements has been allowed to take effect because of the carrier's false certification that it does not change such arrangements, an injured customer should be entitled under

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5/ In apportioning the burden of proof in a complaint proceeding, the complainant should be able to make out a prima facie case by showing that the tariff filing in question materially modifies or abrogates its contract, and that the carrier has not demonstrated substantial cause for the revision. The burden of coming forward with evidence of substantial cause would then be on the carrier. It is particularly critical that the Commission make this clear in the context of maximum-streamlined filings. Otherwise, it will be near-impossible for customers to have a remedy for carrier violations.

Section 206 of the Communications Act to recover any damages it incurs therefrom.

Substantively, the substantial cause test has always been somewhat vague, and this substantive vagueness would, if uncorrected, limit the usefulness of contracts as a market mechanism, because a buyer asked to step up to a long-term deal may be discouraged from doing so unless it can be reasonably sure of the types of circumstances under which the deal may disappear or be materially changed. Merely granting the user a right to terminate the contract if it is changed or abrogated -- while obviously a necessary protection -- is nevertheless inadequate to protect the user against the loss of the benefit of its bargain and the often very large transaction costs of having entered into an individualized contract.

It should be made clear, therefore, that substantial cause will be found to exist only under truly exceptional circumstances. The ambit of the test must be defined in a way that protects carriers against truly extraordinary and unforeseeable changes in circumstance, but still recognizes that contracts cannot serve their intended function if customers cannot rely on them.

Luckily, a body of law already exists which carefully balances precisely these considerations. This is the set of doctrines known variously as "impossibility" and

"frustration of purpose,"[6/] "commercial impracticability," or "failure of presupposed conditions."[7/] Professor Williston's treatise sums the key ingredients up as follows:

> [T]he essence of the present defense of impossibility is that the promised performance was at the making of the contract, or thereafter became, impracticable owing to some extreme or unreasonable difficulty, expense, injury, or loss involved . . . .
>
> * * * *
>
> The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. If so, the risk should not fairly be thrown upon the promisor.

18 Williston on Contracts at 6-8.[8/] Note the key adjectives employed by Williston: the difficulty of performance must be "extreme" or "unreasonable," while the circumstance causing it must have been "unanticipated" and

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6/ See 18 S. Williston and W. Jaeger, Williston on Contracts 1 et seq. (3d Ed. 1978) (cited herein as "Williston on Contracts"); Restatement (Second) of Contracts §§ 261 et seq. (1979) (cited herein as "Restatement").

7/ Uniform Commercial Code (UCC) § 2-615.

8/ The related doctrine of frustration of purpose applies when literal performance of the contract remains possible, but the essential reason for the contract, recognized as such by both parties at the time of contracting, has ceased to exist due to unforeseen circumstances. See 18 Williston on Contracts at 124 et seq.; Restatement at § 265.

make performance "vitally different" from what had been contemplated. These are heavy burdens to carry -- and they should be in order to avoid divesting the contracts of the certainty which is essential to their usefulness in the marketplace. As Williston goes on to stress, without such unusual circumstances:

> The fact that by supervening circumstances, performance of a promise is made more difficult and expensive, or the counterperformance of less value than the parties anticipated when the contract was made, will ordinarily not excuse the promisor.

Id. at 176.[9/]

These concepts are ideal for the purpose of providing certainty for customers while relieving carriers of performance under truly unreasonable circumstances. They have evolved over many decades of experience in the commercial arena. Moreover, they are an excellent formulation of the justness and reasonableness standard in the contract context. It is just and reasonable to expect a carrier to abide by the terms of long-term arrangements into which it has freely entered at arm's length with its customers, absent the compelling reasons which are recognized as valid excuses for nonperformance in the

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9/ Cf. Restatement at § 261, note b: "[M]ere market shifts or financial inability do not usually effect discharge under the [impossibility] rule stated in this section." See also UCC § 2-615, Official Comment 4.

commercial arena generally.[10/] The Commission should clearly state that it is these principles that will be used in applying the substantial cause test to tariff filings which propose to abrogate or materially modify existing contracts.

IV. THE COMMISSION SHOULD CLARIFY NONDOMINANT CARRIERS' INHERENT ABILITY TO PROVIDE A PORTION OF THEIR SERVICES AS PRIVATE CARRIAGE, AND SHOULD SPECIFY CLEAR PROCEDURES FOR DOING SO

In its NPRM in the Interexchange Competition

1984). See Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2644-45 (1990) (cited herein as the "Interexchange Competition" proceeding).

In its initial comments in Interexchange Competition, the Committee agreed that the Commission had the power to allow AT&T to engage in private carriage where consistent with the public interest, but that in order to assure that the public interest was served, the Commission must address a number of issues in implementing any such regime for AT&T. While various issues were described, all went essentially to the same bottom line: how to separate private carriage offerings from common carriage offerings definitively enough to prevent cross-subsidy of the private

wait to establish a clear mechanism for allowing nondominant carriers to offer a portion of their services as private carriage. See Ad Hoc Committee Comments, CC Docket No. 92-13, filed March 30, 1992, at 25-31. While the Committee believes that the nondominant carriers already have the authority to do this under existing rules, it would be very beneficial to the marketplace if the Commission would provide clear confirmation that this is in fact the case.

The distinction between common and private carriage has been perhaps most lucidly adumbrated in National Association of Regulatory Utility Commissioners, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) ("NARUC I"). In that case, the Court noted succinctly:

> [T]he critical point is the quasi-public character of the activity involved. To create this quasi-public character, it is not enough that a carrier offer his services for a profit, since this would bring within the definition private contract carriers which the courts have emphatically excluded from it. What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier "undertakes to carry for all people indifferently . . . ."
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> * * * *
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> But a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal.

NARUC I, 525 F.2d at 641, quoting Semon v. Royal Indemnity Co., 279 F.2d 737, 739 (5th Cir. 1960). As the Court explicitly noted, it is not the number or type of clientele

served that matters, it is the carrier's manner and terms of dealing with them. Id. at 642.

Patently, the same entity may deal with clients in different ways, even from transaction to transaction. It is well established, therefore, that the same entity may offer both common carriage and private carriage services. The Court of Appeals made this clear in Wold, supra, 735 F.2d 1465 (D.C. Cir. 1984), upholding the Commission's determination that the same entity could both offer domestic satellite transmission service on a common carrier basis and sell transponders on a private carriage basis. The Court approved the Commission's method of protecting the public interest -- carefully assuring itself that there would still be sufficient transponder capacity dedicated to common carriage to meet foreseeable demand for common carrier services. Wold, 735 F.2d at 1474-76. The Court cited a number of instances in which the Commission had determined that the public interest would be served by side-by-side common and private carriage regimes. Wold, 735 F.2d at 1474 n. 21, citing Land Mobile Radio Service, 51 F.C.C.2d 945 (1975), aff'd, NARUC I, 525 F.2d 630; Allocation of Microwave Frequencies Above 890 Mc, 27 F.C.C. 2d 359, 411-14 (1959).[11/]

11/ As further support, the Court also cited Home Ins. Co.

Subsequent to Wold, in 1986, the Commission determined that transponder capacity was now plentiful enough relative to demand for common carriage transponder service that it could dispense with the necessity for case-by-case showings that a transponder sale would not jeopardize the availability of common carrier service. Instead, the Commission held: "[D]omestic satellite licensees should be routinely authorized to offer transponders on a noncommon carrier basis absent a showing that it would not be in the public interest . . . ." Martin Marietta Communications Systems, Inc., 60 R.R.2d 779 at para. 11 (1986).

The climate is now ideal for the Commission to make clear that what it did for domsats it will do for other nondominant carriers: "routinely authorize[them] to offer [service] on a noncommon carrier basis absent a showing that it would not be in the public interest . . . ." The Commission has found, in CC Docket No. 90-132, that the interexchange marketplace is characterized by large amounts of excess capacity, and it is highly unlikely that nondominant facilities-based carriers would elect to place such enormous portions of their capacity into a private carriage regime as to jeopardize their common carriage

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11/(...continued)
425, 304 P.2d 930, 941 (1957); and Utilities Comm. v. Gulf Atlantic Towing Corp., 251 N.C. 105, 110 S.E.2d 886, 889 (1959).

customers.[12/] Thus, a presumption can safely be adopted that nondominant carriers may, consistent with the public interest, withdraw some stated percentage of their capacity from common carrier use in order to use it to provide private carriage.[13/]

The Commission need not even substantively amend its rules to permit this. Existing Section 63.71 of the Commission's Rules provides streamlined procedures whereunder nondominant carriers may file, pursuant to Section 214 of the Act, for Commission authorization to discontinue, reduce or impair service, under substantially streamlined procedures. The carrier need only give notice to affected customers, who then have fifteen days to inform the Commission if they oppose the grant of authorization. The rule provides: "The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be

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12/ The decisions of resellers as to whether they wish to do business on a common or private carriage basis, of course, have no impact on the level of excess capacity available, and resellers should a fortiori have maximum flexibility in making those decisions.

13/ As in the domsat context, it would be open to petitioners to show that the withdrawal of capacity from common carriage would harm the public. But given the unfortunate predilection of both AT&T and the nondominant carriers to use the regulatory process to handicap competition, the Commission should make crystal clear that the showing must be detailed and compelling to prevent the grant of a withdrawal authorization.